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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 14 2007

SRC 05 264 50394

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a table tennis coach. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director's conclusion regarding whether the petitioner qualifies as an alien of exceptional ability is ambiguous, but the director definitively concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The director noted the lack of certified translations, as required by regulation.

On appeal, the petitioner submits a recent translation certification purporting to certify the previously submitted translations relating to the petitioner. The document does not identify the translations it purports to now certify other than that they relate to the petitioner. The regulation at 8 C.F.R. § 103.2(b)(3) requires that all foreign language documents be accompanied by a certified translation. In the October 22, 2005 request for additional evidence, the director advised that the translations in the record did not comply with the regulation at 8 C.F.R. § 103.2(b)(3). The regulation at 8 C.F.R. § 103.2(b)(8) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal must be dismissed.

Even if we were to consider the original uncertified translations, we find that the petitioner has not established that he is an alien of exceptional ability or that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, enumerated below, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

The petitioner indicated on the Form ETA 750B that he had three years of education at the Shanghai Institute of Youth Physical Education. The petitioner did not list a degree or certificate received. The petitioner submitted a certificate of work experience from the Shanghai Institute of Physical Education and Athletic Technique asserting that the petitioner "graduated" from the Shanghai Institute of Youth Physical Education. The petitioner did not submit "an official academic record" from the Shanghai Institute of Youth Physical Education. Thus, even if we accepted the uncertified translation of the certificate of work experience, the petitioner has still not established that he received a degree, diploma, certificate or similar award from the Shanghai Institute of Youth Physical Education.

Moreover, section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether

the petitioner's purported degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. The record contains no evidence regarding whether the Shanghai Institute of Youth Physical Education is an institution of higher learning or otherwise accredited to provide education in the petitioner's field, table tennis coaching. Moreover, without evidence as to the type of education required to coach table tennis, we cannot determine whether the petitioner's education is indicative of a degree of expertise above that ordinarily encountered in the field.

In light of the above, the petitioner has not established that he meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner submitted a May 20, 2005 "Coach Qualification Certificate" from the Shanghai Table Tennis Association affirming that the petitioner had been a table tennis coach at the School of Young Physical Education in the Xu Hui District, Shanghai, since 1995 and had also worked as a coach at the Shanghai Institute of Physical Education and Athletic Technique since March 2001. The petitioner also submitted letters from the Shanghai Table Tennis Team and former president of the International Table Tennis Association providing similar information. The petitioner did not submit any confirmation of his employment from the Xu Hui District School of Young Physical Education. The petitioner did submit a January 2001 letter of employment purporting to certify that the petitioner had been retained as a table tennis coach at the Shanghai Institute of Physical Education and Athletic Technique from January 2001 through January 2005. It is not clear how a 2001 certificate can credibly verify employment through 2005. None of the translations of these documents were certified.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) asserts that the evidence to meet this criterion should be in the form of letters from current or former employers. *See also* 8 C.F.R. § 204.5(g)(1). The only letter from an employer is the one dated January 2001 purporting to affirm employment from 2001 through 2005. This document is not credible and, regardless, does not purport to document 10 years of employment.

In light of the above, even if we accepted the uncertified translations submitted to the director, the petitioner would still not have established that he meets this criterion. Specifically, he did not submit the required initial evidence to document 10 years of employment.

A license to practice the profession or certification for a particular profession or occupation

The petitioner does not claim to meet this criterion. [redacted], Vice Executive President of the Shanghai Table Tennis Association asserts, in a letter accompanied by an uncertified translation, that the petitioner "was verified to meet the national qualification of "Middle-Class Table Tennis Coach" in 2001. Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient

evidence of exceptional ability. Thus, if the petitioner's certification as a coach is required for employment in the occupation, than it is not indicative of a degree of expertise significantly above that ordinarily encountered in order to meet this criterion. The record does not contain the petitioner's 2001 credential or any evidence as to its significance. Thus, the petitioner has not established that he meets this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner does not claim to meet this criterion and the record contains no evidence relating to it.

Evidence of membership in professional associations

Counsel asserted that the petitioner meets this criterion because he is a member of China National Table Tennis Team and was a coach of the Shanghai Table Tennis Association, where he received formal recognition as an "Excellent Coach." The petitioner submitted a "Certificate of Work Experience" from the Shanghai Table Tennis Team, accompanied by an uncertified translation, affirming his selection "for professional training" on the China Table Tennis National Team and participation in two national competitions and a World Table Tennis Invitation competition. The petitioner also submitted two certificates of recognition from the Shanghai Institute of Physical Education and Athletic Technique and the Shanghai Physical Education Bureau.

A team is not a professional association. Nevertheless, we acknowledge that the regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides that comparable evidence may be submitted where the criteria are not readily applicable to the alien's occupation. The petitioner has not asserted or documented that there are no professional associations that admit table tennis coaches with a degree of expertise above that ordinarily encountered. Thus, the petitioner has not established that this criterion is not readily applicable. Thus, we need not consider comparable evidence.

The petitioner's recognition from his peers is best considered under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). Thus, even if the petitioner had timely submitted certified translations, the petitioner would not have established that he meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

As stated above, the Shanghai Physical Education Bureau recognized the petitioner as an "advanced Individual" in 2001 and the Shanghai Institute of Physical Education and Athletic Technique recognized the petitioner as an "Elite Coach" in 2003. Had the petitioner timely submitted a certified translation of these documents, he would meet this criterion.

Comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(iii)

The petitioner submits evidence of articles he has purportedly authored in the field. None of the articles are paginated or bear any indicia of publication in a trade journal or other significant media. In the request for additional evidence, the director noted that the published materials submitted did not include the title, date or information regarding the circulation of the publication. The director also implied that the author was not specified, but the uncertified translations indicate the petitioner himself is the author. In response, the petitioner simply resubmitted the articles and uncertified summary translations.

Without evidence that these brief articles were published in well-circulated trade journals, or even published at all, the petitioner cannot establish that they are indicative of a degree of expertise above that ordinarily encountered. Thus, this evidence is not comparable evidence to the types of evidence set forth at 8 C.F.R. § 204.5(k)(3)(ii).

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue, as it was one of the bases of the director's decision.

Neither the statute nor CIS regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to CIS regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

As noted by the director, counsel has attempted to rely on two decisions by this office that were not designated as precedents pursuant to the regulation at 8 C.F.R. § 103.3(c). We concur with the director that these decisions, issued prior to 1998, have no precedential value. Moreover, this office did issue a precedent on national interest waivers, *Matter of New York State Dept. of Transportation*, 22 I&N 215 (Comm. 1998). As this precedent decision was issued after the decisions on which counsel relies, any persuasive value those non-precedent cases might have had is superceded by the precedent.

Counsel briefly discusses *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215, but prefaces his discussion with the following:

> Before we embark on any substantive discussion of evidence, I must remind [Citizenship and Immigration Services] that when the Congress of the United States made substantive changes to U.S. immigration law and added "national waiver interest" [sic] category for aliens of [sic] "holding an advanced degree or exceptional ability" without requiring them to go through the usual labor certification process, the Congress made a conscious determination that to let those obtain permanent resident status without the extremely onerous labor certification application process which under present progressive schedule, takes as long as 5-8 years. It was indeed the Congressional intent that national interest waiver petition[s] would provide strong incentives for those qualified experts to quickly settle down themselves and provide their important services to this country. To do the contrary would clearly defeat the original Congressional intent in this regard.

Counsel provides no legal authority, such as the relevant legislative history, to support these assertions. We emphasize that, in general, the statute requires that petitions for both advanced degree professionals and aliens of exceptional ability be supported by an alien employment certification certified by the Department of Labor. That process "may" be waived in the national interest. It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217. Moreover, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

Any implication that *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215 is not good law is not persuasive. That decision was designated as a precedent pursuant to 8 C.F.R. § 103.3(c) and, thus, is binding on all CIS officers. Counsel cites no legal authority overturning this precedent decision and we know of none. In fact, one federal court has upheld the interpretative nature of the decision. *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001).

Matter of New York State Dep't of Transp., 22 I&N Dec. at 215, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the

national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, athletic coaching. The director concluded that the petitioner had not established that the position sought by the petitioner would allow benefits that would be national in scope. The petitioner does not address this concern on appeal. While the petitioner may have coached national level students in China, what is relevant for this consideration is his *proposed* employment. The petitioner has never explained how coaching junior and adult players at a club in Texas will have a national impact here in the United States.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained table tennis coaches are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

[redacted] asserts that the petitioner "cultivated and supplied sixteen athletics [sic] to China National Table Tennis Team and Shanghai Table Tennis Team. More than ten of his student athletics [sic] have reached a set standard of national "Master of Sports." The translation of Mr. [redacted]s letter, however, was not certified. [redacted], a member of the Chinese National Table Tennis Team, and Shi Maisheng, Head Coach of the Shanghai Table Tennis Team, provide similar information. The petitioner also provided letters from U.S. players and coaches who appear to base their statements on a review of the petitioner's own statements rather than prior knowledge of the petitioner's reputation.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately

responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation at 8 C.F.R. § 103.2(b)(2) requires the submission of primary evidence unless the petitioner demonstrates that such evidence is unavailable or does not exist. Affidavits are only permissible where secondary evidence is also unavailable or does not exist. The petitioner did not submit primary evidence of the accomplishments referenced by his witnesses. Specifically, while some references assert that authorship of articles is significant, as discussed above, the articles submitted by the petitioner bear no markings of a published article, such as pagination and journal title. While counsel asserts that the petitioner has been the subject of media coverage, that coverage is not part of the record. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Finally, the record lacks primary evidence of the accomplishments of the petitioner's students. Moreover, it is not clear whether his students succeeded at the national level while still under the petitioner's tutelage.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.